

ARKANSAS SUPREME COURT

No. CR 07-905

WILLIE J. CARTWRIGHT
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered April 9, 2009

PRO SE APPEAL FROM THE CIRCUIT
COURT OF GRANT COUNTY, CR
2004-119, HON. PHILLIP H. SHIRRON,
JUDGE

AFFIRMED.

PER CURIAM

A jury found appellant Willie J. Cartwright guilty of theft of property and sentenced him to 360 months' imprisonment in the Arkansas Department of Correction, a fine and court costs. The Arkansas Court of Appeals affirmed. *Cartwright v. State*, CACR 05-1382 (Ark. App. Sept. 13, 2006). Appellant timely filed in the trial court a pro se petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1, which was denied without a hearing. Appellant appealed the denial of postconviction relief, and we remanded for limited findings of fact as to whether the prosecution amended the information to raise the level of the charge to a Class B felony prior to appellant's trial. *Cartwright v. State*, CR 07-905 (Ark. Dec.11, 2008) (per curiam).

Appellant had set out three points of error on appeal, each of which concerned the issue of whether his sentence was illegal because he was convicted of a Class B felony, while the only informations filed prior to his trial listed the theft charge as a Class C felony. In the first two points, appellant contended that trial counsel was ineffective for failing to object to the jury instruction as to the Class B charge and for failing to move for a new trial when an information was filed after trial

indicating that the charge was a Class B felony. In his third point, appellant asserted that the sentence was illegal and the judgment invalid on its face. As we indicated in our previous opinion, in order to prevail on any of the points raised, appellant was required to show a fatal error that would invalidate the judgment.

Because the affidavit filed before trial alleged facts to support a B level of the charge, appellant could not show prejudice from an amendment to the degree of the charge. Under Arkansas Code Annotated § 16-89-126(e)(1) (Repl. 2005), a jury may not find a defendant guilty of a higher degree of an offense than that charged in the indictment, even though the proof may support the higher charge. *Robbins v. State*, 219 Ark. 376, 242 S.W.2d 640 (1951). But, this court has allowed an amendment that authorizes a more severe penalty where the defendant was sufficiently apprised of the specific crime charged to the extent necessary to prepare a defense. *Hill v. State*, 370 Ark. 102, 257 S.W.3d 534 (2007). Although it was clear that there would have been no prejudice to the defense to support the requisite fatal error, it was not clear from the record of the trial whether or not the State did in fact amend the information as to the degree of the charge. We remanded for the trial court to take evidence on the issue of whether the information was amended at trial.

The trial court has returned its findings on that issue, concluding that the information was amended as to the degree of the charge. As noted in our previous opinion, the trial court conducted a hearing on the day of trial in which the State moved to amend the information to include enhancement under the habitual offender statute. While the amendment filed after trial listed the charge as a Class B felony, we could not determine whether the document filed posttrial had been shown to defense counsel and the court during the hearing. When announcing the charges to the jury, however, the court did indicate that the theft charge was a Class B felony, and, as the State

pointed out in the hearing on remand, the amended affidavit attached to the amended information included a finding of probable cause signed by the presiding judge on the day of the trial.

In the hearing on remand, the State introduced as evidence, and the trial court reviewed, the record from the trial concerning the hearing and the filed amended information and affidavit. The court requested the court reporter to provide the notes made by her in conjunction with the hearing and then stated that the court's personal recollection was that the case was amended and submitted as a Class B felony. Based upon those findings of fact, the court ruled the State had amended the information as to the degree of the charge at the hearing on the day of trial.

This court does not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Davis v. State*, 366 Ark. 401, 235 S.W.3d 902 (2006) (per curiam). The trial court's findings as to the ruling that the amendment to the degree of the charge did occur during the hearing prior to the trial is supported by the record of the hearing on remand. The court indicated personal knowledge that was supported by the reporter's notes and the transcript of the trial. Because the State moved to amend the information as to the degree of the charge on the day of the trial, appellant's sentence was not in violation of section 16-89-126(e)(1). Appellant failed to make the requisite showing of an information that was fatally defective. Accordingly, we affirm the denial of postconviction relief.

Affirmed.